79-821

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

No. 78-1708

MORGAN AND COMPANY, INC., *Petitioners*

versus

OLIN CORPORATION, INC., *Respondents.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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CITATIONS

OPINIONS BELOW

(a) The opinion of the United States District Court for the Western District of North Carolina consisted of a two (2) paragraph Order attached hereto as Exhibit A, that allowed defendant's motion for a directed verdict. The reason given was; "That there is a lack of substantial (italics ours) evidence to support the inference on which the Plaintiff relies". There was a one (1) page nonpublished opinion by the United States Court of Appeals for the Fourth Circuit. It is set out as follows:

PER CURIAM:

"At the close of plaintiff's evidence in a suit seeking damages for loss of crops of cotton, the trial judge granted a directed verdict and dismissed the complaint. After a careful review of the record, the briefs and the oral arguments, we

agree with the trial judge that there was insufficient proof that the defendant's products caused the loss and that a directed verdict was proper".

There was one (1) sentence of denial of the petition for rehearing by the United States Court of Appeals. It is set out as follows:

"Upon consideration of the petition for rehearing, and with the concurrence of Judge Hall and Judge Merhige,

IT IS ORDERED that the petition for rehearing be, and it hereby is, denied.

s/Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit"

(b) The jurisdiction of this court is invoked because the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Western District of North Carolina have decided a federal question in

conflict with the Seventh Amendment to the Constitution of the United States, which reads as follows:

"AMENDMENT VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law."

It is also in conflict with applicable decisions of this court.

(i) The date of the judgment of the United States Court of Appeals for the Fourth Circuit is June 21, 1979. The judgment shows no date of entry.

(ii) The date of the Order denying Petition for Rehearing was August 8, 1979, and it was entered on the 13th day of August, 1979.

(iii) The statutory provision believed to confer on this court jurisdiction to review the judgment below by writ of certiorari is 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

Could the Trial Court deny plaintiff a jury trial when all factors, seeds, insecticides and planting were the same for his entire crop except the use of defendant's products, Terraclor Super-X and Terraclor Super-X with Di-Syston, and where a 13 acre field on which defendant's products were not used produced 13 bales of cotton, and when defendants product was applied to one row of cotton and not to three (3) other rows (because only one hopper of a four hopper contained defendant's products) the row treated by defendants products was severely damaged and the other three (3) rows to which defendants products were not applied were perfect.

STATEMENT OF THE CASE

The original jurisdiction of this action brought in the United States District Court for the Western District of North Carolina is based on diversity, 28 U.S.C. Section 1332.

Plaintiff planted 600 acres of cotton and the application of all the insecticides, herbicides, fertilizer and seed were the same. The only difference was in the application and lack of application of defendant's two products, Terraclor Super-X and Terraclor Super-X with Di-Syston. These products were used interchangeably. Everywhere Terraclor Super-X alone was used all the cotton died. Where Terraclor Super-X and Terraclor Super-X with Di-Syston were used at the same time without identifying which of the four (4) hoppers contained Terraclor Super-X or Terraclor Super-X with Di-Syston, the cotton died in rows. That where no Terraclor Super-X or no Terraclor Super-X with Di-Syston was applied, the cotton crop was excellent.

The specific instances which point unerringly to Terraclor as the culprit are: The Terraclor was applied to four rows at a time from four Gandy hoppers. Plaintiff gave out of Terraclor when he was completing the Paul Biggers 30 acre field and planted the last three acres without any Terraclor. These three acres were perfect, the rest of the 30 acres died.

The Bobby Austell 12 acres was planted immediately after Paul Biggers'. No Terraclor or Terraclor Super-X was used and this 12 acres produced twelve 445 pound bales of cotton.

The Paul Hamrick 6 acre field was planted next. The first three acres of this field, where no Terraclor or Terraclor Super-X was used, were perfect. The planter caught up with the plow and stopped and Leon Teal found a clod of Terraclor in the second hopper from the right and broke it up so it would feed through. He continued to plant for another acre and a half and caught up again. This time he took a rubber hammer and

beat on each hopper to dislodge the Terraclor which had adhered to the sides. The row planted by the second hopper from the right, after the Terraclor was dislodged, had heavy damage. The last part of the field planted, after he had beat on the hoppers with the rubber hammer and dislodged Terraclor, had heavy damage.

ARGUMENT

It is frequently stated that the trial judge may dismiss the case at the close of plaintiff's evidence if he concludes that no reasonable man could vote for a verdict for plaintiff.

However, a careful reading of the cases discloses that this statement of the rule is, at best, incomplete. The reasonable man referred to in the rule must, before he begins to exercise his reasonable judgment, treat all plaintiff's evidence as true and resolve all doubts in favor of plaintiff. It is only after he has done these things that he is free to apply the rule of

reason and he must apply it by giving full effect to plaintiff's evidence.

Unless this rule is followed precisely, courts will find themselves denying litigants the right to a jury trial in violation of the seventh amendment to the Constitution of the United States.

A very positive declaration of the duty of the courts to protect the right of trial by jury was clearly enunciated by Justice Murphy in Mary Tennant v. Peoria & Pekin Union & Co., 321 US 29, 88 L Ed 520, where he says on page 525 of the Lawyers Edition:

> "IT IS THE JURY, NOT THE COURT, WHICH IS THE FACT-FINDING BODY. IT WEIGHS THE CONTRADICTORY EVIDENCE AND INFERENCES, JUDGES THE CREDIBILITY OF WITNESSES, RECEIVES EXPERT INSTRUCTIONS, AND DRAWS THE ULTIMATE CONCLUSION AS TO THE FACTS. THE VERY ESSENCE OF ITS FUNCTION IS TO SELECT FROM AMONG CONFLICTING INFERENCES AND CONCLUSIONS THAT WHICH IT CONSIDERS MOST REASONABLE. Washington & G.R. Co. v. McDade, 135 US 554, 571, 572, 34 L Ed 235, 241, 242, 10 S. Ct 1044; Tiller v. Atlantic Coast Line R. Co., supra (318 US 68, 87 L Ed 618,

63 S. Ct 444, 143 ALR 967; Bailey v. Central Vermont R. Co., 319 US 350, 353, 354, 87 L Ed 144, 1447, 1448, 63 S Ct 1062. THAT CONCLUSION, WHETHER IT RELATES TO NEGLIGENCE, CAUSATION OR ANY OTHER FACTUAL MATTER, CANNOT BE IGNORED. COURTS ARE NOT FREE TO REWEIGH THE EVIDENCE AND SET ASIDE THE JURY VERDICT MERELY BECAUSE THE JURY COULD HAVE DRAWN DIFFERENT INFERENCES OR CONCLUSIONS OR BECAUSE JUDGES FEEL THAT OTHER RESULTS ARE MORE REASONABLE.

UPON AN EXAMINATION OF THE RECORD WE CANNOT SAY THAT THE INFERENCE DRAWN BY THIS JURY THAT RESPONDENT'S NEGLIGENCE CAUSED THE FATAL ACCIDENT IS WITHOUT SUPPORT IN THE EVIDENCE. THUS, TO ENTER A JUDGMENT FOR RESPONDENT NOTWITHSTANDING THE VERDICT IS TO DEPRIVE PETITIONER OF THE RIGHT TO A JURY TRIAL. NO REASON IS APPARENT WHY WE SHOULD ABDICATE OUR DUTY TO PROTECT AND GUARD THAT RIGHT IN THIS CASE. WE ACCORDINGLY REVERSE THE JUDGMENT OF THE COURT BELOW AND REMAND THE CASE TO IT FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.

REVERSED." (Capitals and italics ours.)

The Supreme Court of the United States reiterated this rule in Continental Ore Co., v. Union Carbide Corp., 370 US 690, 82 S Ct 1404, speaking through Justice White, makes it perfectly clear on page 782 of 8 L Ed 2d, where it says:

"The Court of Appeals was, of course, bound to view the evidence in the light most favorable to Continental and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn.6"

Another very well reasoned opinion which concisely states the rule was written by Circuit Judge Hill in Wylie v. Ford Motor Company, 502 F 2d 1292, where he says on page 1294:

"Also the trial court when considering a directed verdict motion may not weigh the evidence or determine where the preponderance of the evidence lies. The court should not consider the credibility of witnesses, and only clearly incredible evidence should be excluded from the courts consideration. Anderson v. Huddspare Pine Inc., 299 F 2d 874 (10th Cir 1962)." (Emphasis added.)

"6As Professor Moore has indicated, 'In ruling on the motion [for directed verdict] the trial court views the evidence in the light most favorable to the party against whom the motion is made. On appeal, likewise, the appellate court must consider the evidence in its strongest light in favor of the party against whom the motion for directed verdict was made, and must give him the advantage of every

fair and reasonable intendment that the evidence can justify.' 5 Moore's Federal Practice 2316 (2d ed, 1951). See Pawling v. United States (US) 4 Cranch 219, 2 L Ed 601; Gunning v. Cooley, 281 US 90, 74 L Ed 720, 50 S Ct 231; Tennant v. Peoria & P.U.R. Co., 321 US 29, 88 L Ed 520, 64 S Ct 409, 15 NCCA NS 647, Cf. Smith v. Reinauer Oil Transport, Inc. 256 F 2d 646, 649 (CA 1st Cir)."

It is apparent from the colloquy between Judge Jones and counsel that he selected the inferences he wished to draw and he decided that certain other equally reasonable inferences were impermissible.

The only cases relied upon to support this dismissal were referred to by Judge Jones in his one page Order, and an examination of those cases, which follows, will clearly demonstrate that none of them support his ruling. They are: The Ralston Purina Company v. Edmunds, 241 F 2d 164. This was a case where the feed for one flock of turkeys was changed and egg production dropped. There were no circumstances from which it could be inferred that the feed caused the

problem. As a matter of fact, the plaintiff's testimony also showed there was no nutritional deficiency and that grain not furnished by defendant was consumed by all the turkeys in more than a normal amount. Had there been two flocks of turkeys, both with everything the same except defendant's feed, and production of the flock changed to defendant's feed had dropped dramatically, the case would have some weight. This was not the case.

It could not possibly control the instant case, because in it every other factor was the same over the entire crop.

In Kekelis v. Machine Works , 273 NC 439. This is a case of res ipsa loquitur. Our case was based on a specific warranty, implied warranty and negligence. In Kekelis, the machine which caused the injury was out of the possession of the defendant for several hours before the accident, and there was no evidence as to what was, or was not, done to that machine in

the interim time. That is not the case here and, even if it were, plaintiff is certainly not restricted to the doctrine of res ipsa loquitur when the product came in sealed bags with the warranty plainly printed on them and plaintiff ordered the product directly from defendant whose own literature expressly warranted that the product was fit for the use intended.

Also, Kekelis v. Machine Works is a State decision and the Federal courts have repeatedly held that the sufficiency of the evidence to take a case to the jury in diversity actions is determined by federal and not by state standards. This rule was stated by this court in Brandt v. Robinson Investment Co., 435 F 2d 1345, and is again clearly set out in Faircloth v. Lamgraze Harbor Co., Inc., 467 F 2d 685, a Fifth Circuit case.

In Thomas v. Kasco Mills, 218 F 2d 256 (4th

Cir. 1955), none of the other conditions were the same, and a disease was diagnosed in Claimants turkeys, but there was no evidence circumstantial or otherwise to connect the disease to the manufacturer's product.

Here circumstantial evidence points unerringly to respondents product.

Appellant respectfully insists that the rulings in this case have denied to his client his constitutional right to a trial by jury without informing him, either in the trial or the appellate court, of the reasons for the denial and he respectfully implores this court to grant his petition for certiorari.

Respectfully submitted,

s/ J. Nat Hamrick
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APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 78-1708

MORGAN AND COMPANY, INC.,

Petitioner,

versus

OLIN CORPORATION, INC.,

Respondent.

EXHIBIT A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

SHELBY DIVISION

SH-C-77-15

MORGAN AND COMPANY, INC., Plaintiff,	)	
vs.	)	O R D E R
OLIN CORPORATION, INC., Defendant.	)	

At the close of the Plaintiff's case the Defendant moved for a directed verdict on the graounds that the evidence was insufficient to carry the case to the jury and that it is entitled to a dismissal as a matter of law.

The Court funds and concludes that the evidence taken and considered in a light most favorable to the Plaintiff is not sufficient to show that the Defendant's product was defective or that it caused the injury complained of by the

Plaintiff. That there is a lack of substantial evidence to support the inference on which the Plaintiff relies. The evidence is not sufficient to show a breach of warranty or negligence on the part of the Defendant resulting in Plaintiff's injury and loss. The Court relies upon the cases of Ralston Purina Company v. Edmunds, 241 F 2d 164 (4th Cir. 1957), Thomas v. Kasco Mills, 218 F 2d 256 (4th Cir. 1955); Kekelis v. Whitin, 273 N.C. 439, 160 S.E. 2d 320.

The Court therfore concludes that the motion should be allowed.

IT IS THEREFORE ORDERED THAT the Defendant's motion for a directed verdict in its favor be and the same is hereby allowed and the action is hereby dismissed.

This the 28th day of July, 1978.

s/ Woodrow W. Jones
Chief Judge

CERTIFICATE OF SERVICE

This is to certify that two (2) copies of the foregoing Petition for Writ of Certiorari were served upon counsel for Appellee by depositing a copy thereof in the United States Mail, first class postage, addressed to:

Thomas Ashe Lockhart, Esquire
Cansler, Lockhart, Parker & Young, P.A.
1010 City National Center
200 South Tryon Street
Charlotte, North Carolina 28202

This 23rd day of November, 1979.

s/ J. Nat Hamrick
J. Nat Hamrick
Attorney for Petitioner